



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 26, 2004

Mr. Carey Smith
General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2004-3387

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID#199219.

The Texas Department of Human Services (the "department") received a request for information regarding the Girling Home Health Care Agency. You state that the department has released most of the requested information but will withhold some responsive information pursuant to the previous determination issued to the department in Open Records Letter No. 2001-5348 (2001)(previous determination for any reports, records, and working papers used or developed during investigations conducted under section 142.009 of the Health and Safety Code, and any identifying information of individuals contained in certain federal forms). *See* Gov't Code § 552.301(a); *see also* Open Records Decision No. 673 at 6-9 (2001) (delineating instances in which attorney general decision constitutes previous determination under Gov't Code § 552.301). You claim that the remainder of the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim.

Initially, we will address the department's responsibilities under the Act. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be

withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.

The department did not submit written comments stating the reasons why the stated exceptions apply and a copy of the specific information requested or representative samples within fifteen business days of its receipt of the request. Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Because section 552.101 presents a compelling reason to overcome the presumption that information is public, we will consider its applicability to the submitted information.

You assert that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. Section 142.009(d)(5) provides:

(d) reports, records, and working papers used or developed in an investigation made under this section are confidential and may not be released or made public except:

...

(5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency[.]

Health & Safety Code § 142.009(d)(5). You assert that the identifying information of individuals contained in the submitted state form is confidential under section 142.009(d)(5). Specifically, you state that the agency representative who signed the state form is not the

owner of the agency. Based on your representations and our review of this particular information, we agree that the department must withhold the information you have marked as well as the information we have marked pursuant to section 552.101 in conjunction with section 142.009(d)(5) of the Health and Safety Code. Additionally, you state that the responsive document identified as a "Patient/Personnel Identification Key" is a working paper used in the investigation. We agree that this document must be withheld in its entirety pursuant to section 552.101 in conjunction with section 142.009(d).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'Cary Grace', with a long horizontal flourish extending to the right.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/lmt

Ref: ID#199219

Enc. Submitted documents

c: Ms. Debbie Moser
Maloney & Maloney, P.C.
2000 Milam Building
115 Travis Street
San Antonio, Texas 78205
(w/o enclosures)